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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re RUSSELL WATERS, on Habeas Corpus.	B218568 (Los Angeles County Super. Ct. No. BH005601)

APPEAL from an order of the Superior Court of Los Angeles County. Peter Paul Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Jennifer A. Neill and Charles Chung, Deputy Attorneys General, for Appellant.

Rich Pfeiffer, under appointment by the Court of Appeal, for Petitioner and Respondent.

The superior court found that the Governor's decision to reverse the grant of parole to an inmate, Russell Waters, was not supported by the requirement of "some evidence" that his release would constitute a current threat to public safety. It thus granted Waters's petition for a writ of habeas corpus and ordered him released on the parole date calculated by the Board of Parole Hearings (the Board). We previously denied a stay of the superior court's order, and we now affirm that order.

FACTUAL AND PROCEDURAL SUMMARY

In 1990, Waters pled guilty to second degree murder, with an enhancement for use of a firearm, and possession of a controlled substance. He was sentenced to a prison term of 16 years to life for the murder and a concurrent two-year prison term for the drug offense. Waters was first eligible for parole in February of 2001.

In May of 2008, at Waters's sixth parole consideration hearing, the Board found he was suitable for parole and no longer a "threat to public safety if released from prison." The Board relied upon a 2005 psychological evaluation that supported release and the assessment of the clinical psychologist, who found Waters was "quite committed to not only remaining abstinent and drug free and crime free but he's committed to serving others and being a force for good in his community." Waters also recognized that his prior use of cocaine had negatively affected his life and that of his family and the victims' families. A previous psychological evaluation also favorably concluded that Waters "has gained insight into [the] inherent dangers of drugs, alcohol and guns . . . [and his] potential for violence would be no greater than the average citizen."

At the time of the commitment offense in 1990, Waters was 26 years old, was addicted to drugs, and was part of a group of friends who used drugs together. Waters suggested that the group rob a restaurant deliveryman who carried cash, but then another person in the group suggested robbing the restaurant. Waters's companion gave him a gun, which Waters left near the restaurant. Although Waters told his companions not to shoot anyone, a codefendant took the gun into the restaurant, opened fire, killed one person, and wounded another. Waters's only other criminal record consisted of his failure to appear in court for a jay-walking ticket, which occurred in Hawaii where he

attended the University of Hawaii for two years. However, Waters admitted participating in another unrelated robbery, for which he apparently was not charged or apprehended.

While incarcerated in prison, Waters had a relatively minor record of misbehavior. He was disciplined on five occasions. Although two of the citations involved physical altercations, they occurred in 1991 and 1995. Waters incurred no disciplinary actions for 10 years, until 2005 when he was cited for possessing a state-owned light bulb from an "exit" light sign. He appealed the citation, stating that another inmate had given him the light bulb, and the charge was reduced from destroying state property to possession of contraband. He was sanctioned by loss of yard and other privileges for 90 days. In 2006, Waters was cited once for excessive telephone usage.

Waters earned vocational certifications qualifying him to practice as an optician and a contact lens dispenser. While incarcerated, he also worked as a barber, a porter, a central kitchen clerk and kitchen worker, a library clerk, and a teacher's aide. Waters participated in various therapy programs, volunteered his time as a motivational speaker, and wrote a published book entitled Mastering the Law of Destiny.

In May of 2008, the Board found him suitable for parole. It placed various conditions on his parole, including narcotics testing, participating in a substance abuse program, and prohibiting any association with gang activity.

In October of 2008, the Governor exercised his authority and reversed the grant of parole to Waters. The Governor stated, in pertinent part, that he was "especially concerned with [Waters's] recent incidents of breaking rules. This indicates to me that he is not yet at the point where he can consistently follow the rules of society." The Governor also stated his concern that Waters lacked "full insight into the circumstances of the crime and his responsibility for the murders." "The gravity of the murder and Mr. Waters's history of substance abuse support my decision . . . ."

Waters filed a petition for a writ of habeas corpus, and in July of 2009 the superior court granted his petition. The court found that the Governor's decision reversing Waters's grant of parole was not supported by "some evidence" in the record. The court

reinstated the Board's decision granting Waters's parole and ordered that he be released in accordance with the parole date calculated by the Board.

Thereafter, Waters was released from prison and is on parole supervision. This appeal ensued.

DISCUSSION

I. Analytical framework and the standard of review.

"[T]he Governor undertakes an independent, de novo review of the inmate's suitability for parole. [Citation.]" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204 (*Lawrence*).) The Governor "must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation." (*Id.* at p. 1219.)

The decision to grant parole is a subjective analysis (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)), that should be guided by a number of factors, some objective, identified in Penal Code section 3041 and the Board's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) The Governor's decision to affirm, modify, or reverse the decision of the Board rests on the same factors that guide the Board's decision (Cal. Const., art. V, § 8, subd. (b)), and is based on "materials provided by the parole authority." (Pen. Code, § 3041.2, subd. (a).) "Although these provisions contemplate that the Governor will undertake an independent, de novo review of the prisoner's suitability for parole, the Governor's review is limited to the same considerations that inform the Board's decision." (*Rosenkrantz*, at pp. 660-661.)

In reviewing the Governor's decision to reverse the Board's determination that an inmate is suitable for parole, the standard of review is "whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*Lawrence*, *supra*, 44 Cal.4th at p. 1191.) "[A]lthough . . . the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the

prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Id*. at p. 1214.)

"Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. As with the discretion exercised by the Board in making its decision, the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Rosenkrantz, supra,* 29 Cal.4th at p. 677.)

Regarding the standard for judicial review of parole decisions, "the court may inquire only whether some evidence in the record before the Board" supports the decision reversing the Board, based on the factors specified by statute and regulation. (*Rosenkrantz*, *supra*, 29 Cal.4th at pp. 658 & 658-667.) In *Lawrence*, the Supreme Court noted that its prior decisions characterizing the "some evidence" standard as extremely deferential and requiring only "a modicum of evidence" (*Lawrence*, *supra*, 44 Cal.4th at pp. 1191, 1206, 1226) had generated some confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Id.* at p. 1206.) *Lawrence* explained that although some courts interpreted *Rosenkrantz* as limiting the judiciary to reviewing whether "some evidence" exists to support an unsuitability factor cited by the Board or Governor, the proper analysis is whether "some evidence" exists to support "the core determination required by the statute before parole can be denied—that an inmate's release will unreasonably endanger public safety." (*Lawrence, supra,* 44 Cal.4th at p. 1209.)

The *Lawrence* court clarified that the analysis required when reviewing a decision relating to a prisoner's current suitability for parole is whether some evidence supports the decision of the Board or the Governor "*that the inmate constitutes a current threat to*

public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence*, *supra*, 44 Cal.4th at p. 1212, italics added.) *Lawrence* explained that the standard for judicial review, although "unquestionably deferential, [is] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Id*. at p. 1210, italics added.)

For example, "mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Lawrence*, *supra*, 44 Cal.4th. at p. 1227.) *Lawrence* also observed that when there has been a lengthy passage of time, the Governor may continue to rely on the nature of the commitment offense as a basis to deny parole only when there are other facts in the record, including the prisoner's history before and after the offense or the prisoner's current demeanor and mental state, that provide a rational nexus for concluding an offense of ancient vintage continues to be predictive of current dangerousness. (*Id.* at pp. 1211, 1214, 1221.)

Accordingly, "'the relevant inquiry for a reviewing court is . . . whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor.'" (*In re Shaputis* (2008) 44 Cal.4th 1241, 1255 (*Shaputis*).) A reviewing court "will affirm the Governor's interpretation of the evidence so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors." (*Id.* at p. 1258.)

II. The Governor failed to identify facts reasonably probative of Waters's purported current dangerousness.

The Governor focused on several factors which were either factually incorrect or failed to provide a rational nexus predictive of current dangerousness. The Governor stated that he was "concerned with [Waters's] history of violence, especially his violence in prison, and I am especially concerned with his recent incidents of breaking rules. This indicates to me that he is not yet at the point where he can consistently follow the rules of

society." However, there were no "recent" incidents with a rational nexus to current dangerousness. Three years before the Governor's reversal of the grant of parole, Waters had been cited for unauthorized possession of state property (a light bulb) and the prior year, cited on one occasion for excessive telephone usage. Waters's rules violations for fighting with another prisoner and for mutual combat occurred over 13 years ago, and thus were not recent incidents.

The Governor also was concerned that Waters "lacks full insight into the circumstances of the crime and his responsibility for the murders." To the extent the Governor was under the misimpression that there was more than one murder, the Governor based his conclusion on a mistake of fact. Even assuming the Governor accurately understood that there was only one murder (because elsewhere he referred to the crime in the singular), he nonetheless failed to identify "facts [that] are *probative* to the central issue of *current* dangerousness" to the public. (*Lawrence*, *supra*, 44 Cal.4th at p. 1221.)

The Governor stated that at a prior Board hearing in 2004 (not the current Board hearing in May of 2008), Waters denied involvement in the robbery until pressed on the point by a representative from the district attorney's office. The Governor also stated that in 2007 Waters acknowledged stashing the rifle used in the robbery, but denied selecting the target restaurant and not until 2008 did he admit that it was his idea to rob that particular business and that he had received a small amount of money from the robbery. Although a lack of insight into and a failure to take responsibility for the commitment offense are legitimate reasons to deny parole (see *Shaputis*, *supra*, 44 Cal.4th at pp. 1246-1247), the Governor here failed to establish any nexus to a current risk of dangerousness because his factual review was flawed.

As the superior court observed in granting Waters's petition for a writ of habeas corpus, although Waters acknowledged the statements cited by the Governor, "during the 2008 parole suitability hearing, [Waters] proactively addressed each confusing statement [he had previously made] and provided viable explanations as to how they were taken out of context." The superior court aptly explained as follows: "The Governor cited that

[Waters] once said he was not involved in the robbery, but in 2004 stated that he was fully involved in the robbery. [Waters] explained that the first statement was meant to convey that he was not physically present at the robbery. The Governor cited that in 2007, [Waters] stated he did not plan the robbery but later admitted to planning the robbery. [Waters] explained that he did not wish to convey there was a detailed plan where the group of defendants set out times and schemes to rob the restaurant. Rather, [Waters] explained that the group simply decided they needed money and to obtain money they would rob the Thai Chef. The Governor cited that [Waters] said he did not select the target, and later said he did select the business. [Waters] explained that he selected the Thai Chef, but had hoped to rob the delivery man [when] the delivery man returned to the restaurant after being paid by a customer. Codefendant Simpson was the person who chose to rob the restaurant itself. Thus, while [Waters] selected the Thai Chef business, he did not intend to target the clerk inside the restaurant. Lastly, the Governor cited that [Waters] said he did not receive any money from the robbery, but recently admitted he did receive some payment. [Waters] explained that, in total, the robbery yielded $20 which, after being split [among] all the co-defendants, meant [Waters] received one or two dollars which is 'a nominal amount.'"

It is thus apparent that the various comments by Waters about the commitment offense were truthful. The Governor seized on out-of-context and innocent remarks by Waters, whose comments did not show any lack of insight into the crime or failure to take responsibility for it.

In *Shaputis*, *supra*, 44 Cal.4th 1241, in stark contrast to the facts here, the court upheld the Governor's reversal of a grant of parole, based in part on the Governor's reliance on a lack of insight and acceptance of responsibility for criminal conduct. (*Id.* at pp. at 1246-1247.) In *Shaputis,* the prisoner was convicted of the second degree murder of his second wife, and he had physically abused her, as well as his first wife. A psychological assessment found that the prisoner had "'limited . . . insight'" into his antisocial behavior and the close association between his history of alcohol abuse and his domestic violence. (*Id.* at p. 1251.) The court found support for the Governor's decision

based on the prisoner's "statements at his parole hearing characterizing the commitment offense as an accident and minimizing his responsibility for the years of violence he inflicted on his family, and in recent psychological evaluations noting [his] reduced ability to achieve self awareness." (*Id.* at p. 1260, fn. 18.) That is not the situation here, where the record is devoid of "some evidence" that Waters lacks insight into the commitment offense.

Finally, the Governor's reliance on the "gravity of the murder and Mr. Waters's history of substance abuse" is also unavailing. The immutable circumstances of the commitment offense cannot alone be used to deny parole. "[T]he aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public . . . ." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214, italics added.)

The Governor's reference to Waters's history of substance abuse is also unavailing. Waters has been sober for the lengthy term of his incarceration. The superior court further found that Waters's "psychological report stated that he is very amenable to treatment and that 'he appears to be quite committed to his sobriety and is actively engaged in [Narcotics Anonymous].' [Waters] has also arranged for support programs in his community should he be granted parole." Waters acknowledged that he was addicted to cocaine at the time of the commitment offense and recognized that his need to purchase more drugs was the motivation behind the crime, thus further showing insight into the commitment offense and a lack of nexus to any *current* risk of dangerousness.

III. The appropriate remedy is not to vacate the Governor's decision and provide a second opportunity for him to assess the Board's parole decision, but rather to affirm the superior court's order enforcing the decision of the Board.

Appellant contends that even if we uphold the superior court's order granting the petition for a writ of habeas corpus, the proper remedy is not to affirm the superior court's order releasing Waters in accordance with the terms of parole imposed by the Board. Rather, appellant urges that a remand to the Governor to reconsider the Board's parole grant is consistent with due process and somehow appropriate.

Appellant emphasizes that the decision to grant or revoke parole is vested exclusively in the executive branch. (Cal. Const., art. V, § 8, subd. (b); *Rosenkrantz, supra*, 29 Cal .4th at p. 659.) However, "[t]he Governor's constitutional authority is limited to a review of the evidence presented to the Board. (Cal. Const., art. V, § 8, subd. (b) [the Governor may only affirm, modify or reverse the Board's decision 'on the basis of the same factors which the parole authority is required to consider']; see also Pen. Code, § 3041.2, subd. (a).)" (*In re Vasquez* (2009) 170 Cal.App.4th 370, 386.)

As previously discussed, our review of this record reveals the absence of some evidence to support the Governor's decision, and "further consideration by the Governor will not change this fact." (*Ibid*.) Affirming the superior court's order under review is the appropriate remedy. Granting the Governor an unlimited number of reviews of the Board's parole decision would not only be a useless repetitive act, but it would violate due process and render the writ of habeas corpus meaningless. (*In re Masoner* (2009) 179 Cal.App.4th 1531, 1538-1541.)

Appellant cryptically and gratuitously asserts that the entire record was not submitted to the superior court. However, there is no indication as to what was purportedly not submitted to the superior court, whose fault that may have been, and how it would have any significance whatsoever on the outcome. Appellant also urges there was no finding that a remand to the Governor would be futile, although no such finding below is required.

Accordingly, the record on appeal establishes that remand of this case to the Governor would serve no useful purpose. By vacating the Governor's decision and reinstating the decision of the Board—the executive body primarily charged with making parole suitability determinations—we do not substitute our judgment for that of the executive branch. In determining that the Governor failed to identify any evidence justifying the reversal of the Board's decision, we do no more than perform the traditional judicial function of ensuring proper application of executive prerogatives. (See, e.g., *Morrissey v. Brewer* (1972) 408 U.S. 471, 480; *In re Prewitt* (1972) 8 Cal.3d 470, 473-475.)

Declining to remand this matter for further consideration by the Governor is also consistent with the approach of appellate decisions after *Lawrence*, *supra*, 44 Cal.4th 1181, which have recognized that when the record reflects no evidence supporting the denial of parole, the proper disposition is to avoid remand and, in effect, to order the release of the inmate. (See, e.g., *In re Moses* (2010) 182 Cal.App.4th 1279, 1313-1314; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256-257; *In re Burdan* (2008) 169 Cal.App.4th 18, 39; *In re Vasquez*, *supra*, 170 Cal.App.4th at p. 386; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491-1492.) Indeed, in *Lawrence* itself, which began as an original proceeding in the Court of Appeal, the Supreme Court affirmed the judgment of that court, which had vacated the Governor's decision and reinstated the Board's parole release order. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1190, 1201, 1229.)[1]

Accordingly, because we have reviewed the record and conclude that there is a lack of the requisite "some evidence" to support the Governor's determination that Waters is purportedly a current threat to public safety, the appropriate remedy is to vacate the Governor's decision and reinstate the Board's grant of parole. The Board, of course, retains the power to rescind parole on an appropriate record based on events occurring after its suitability determination. (*In re Powell* (1988) 45 Cal.3d at 894, 901-902; Pen. Code, §§ 3041.5, 3041.7; Cal. Code Regs., tit. 15, §§ 2450-2454.)

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1 We note that the Supreme Court has recently granted review in two cases in which the issue presented is the proper remedy where a court finds that a Board (not a gubernatorial) decision to deny parole cannot be upheld. (*In re Prather* (Apr. 28, 2009, B211805) [nonpub. opn.] review granted Jul. 29, 2009, S172903; *In re Molina* (Apr. 16, 2009, B208705) [nonpub. opn.] review granted Jul. 29, 2009, S173260.)

DISPOSITION

The superior court's order granting Waters's petition for writ of habeas corpus is affirmed. Thus, the Governor's 2008 decision reversing the Board's 2008 grant of parole is vacated and the Board's 2008 grant of parole is reinstated on the terms and conditions stated therein.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.